# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

CARAVAN KNIGHT FACILITIES MANAGEMENT, INC,

Respondent Employer,

and

Case No. 07-CA-081195

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO, AND ITS LOCAL 1700,

Respondent Unions,

and

Case No. 07-CB-082391

ARETHA A. POWELL, an Individual,

Charging Party.

Robert A. Drzyga, Esq., for the General Counsel. Daniel G. Cohen, (Pilchak Cohen & Tice, P.C.), Auburn Hills, Michigan, for the Respondent Employer Darcie R. Brault, Esq., (McKnight, McClow, Canzano, Smith & Radtke, P.C.), Southfield, MI, for the Respondent Unions

#### DECISION

#### STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Detroit, Michigan, on November 7-9, 2012 and January 7-8, 2013. The complaint, issued on August 21, alleges that Caravan Knight Facilities Management, LLC (the Company) violated Section 8(a)(1) of the Act by coercively interrogating employees regarding their activities with the Board, Section 8(a)(3) by imposing onerous working conditions on the Aretha Powell, the charging

<sup>&</sup>lt;sup>1</sup> All dates are in 2012 unless otherwise indicated.

party, and then disciplining her because she engaged in concerted protected activities. The complaint also alleges that the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, and its Local 1700 (the Local Union), collectively referred to as the Unions, breached the duty of fair representation owed to Powell in violation of Section 8(b)(1)(A) or (b)(2) of the National Labor Relations Act (the Act) and violated Section 8(a)(3) by causing her termination because she engaged in protected conduct. The Respondent Unions deny the charges and contend that Powell was terminated after threatening another member of the bargaining unit.

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On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Company and the Union,<sup>2</sup> I make the following

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#### FINDINGS OF FACT

## I. JURISDICTION

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The Company is a Michigan corporation with a worksite at the Chrysler Sterling Heights Assembly Plant located in Sterling Heights, Michigan, where it annually derives gross revenues in excess of \$1,000,000 and, during that same period, purchased and received at the Sterling Heights facility, goods and materials valued in excess of \$50,000 directly from points outside of the State of Michigan. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

## A. The Parties

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The Company performs maintenance, cleaning and janitorial services for Chrylser at its Sterling Heights Assembly Plant (SHAP). SHAP includes a main plant, the Linkers Building, Fitness Center and Jitney Repair section. The SHAP supervisors relevant to this dispute include: Lamont Richie and Scott Paulsen, shift supervisors; and Shoun Walle, a site manager.

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The Union and the Company are parties to a collective bargaining agreement (CBA) in effect from December 2009 through November 2012. Janitors are covered by the CBA.<sup>3</sup> In pertinent part, the overtime work provision consisted of two types of overtime assignments – mandatory overtime and voluntary overtime.<sup>4</sup>

<sup>&</sup>lt;sup>2</sup> The Union's Motion for Leave to File Response Brief, dated February 28, 2013, is denied, as there is no provision in the Board's Rules for such submissions. Moreover, the General Counsel's request for reconsideration of my trial ruling regarding Rejected Exhibit GC Exh. 29, and impeachment of Balinda Tanner based on her criminal plea, is also denied.

<sup>&</sup>lt;sup>3</sup> GC Exh. 2.

<sup>&</sup>lt;sup>4</sup> GC Exh. 2, §15.

Aretha Powell was hired by the Company as a janitor on September 2, 2008 and became a member of the bargaining unit. She started work at SHAP on the third shift and transferred to the first shift in 2011. While on the first shift, Powell worked with approximately 15 other janitors. In 2012, Powell's immediate supervisor was Paulsen. Her duties included sweeping, mopping, cleaning windows, dusting, vacuuming, cleaning restrooms and emptying trash.<sup>5</sup>

## B. Company Operations

The Company's employees at SHAP are assigned to one of three daily 8-hour shifts. Mandatory attendance is required at pre-shift meetings, which were held in the "cage area" prior to the start of each shift. In May, the pre-shift meetings were conducted by Richie and Paulsen. The cage area contains supplies, employee lockers, as well as tables, benches, chairs and a microwave used by employees during breaks and lunch periods. A bulletin board is posted inside the entrance of the cage area. This bulletin board has an overtime sign-up sheet posted on it that employees use to volunteer for overtime.

## C. Overtime Work

Janitors work overtime at SHAP. The Company records the number of overtime hours worked by employees on an overtime equalization list. That list has been kept in Walle's office pursuant to his agreement in 2009 with Davis because the posted list was frequently removed or defaced. Employees still had access to their overtime hours upon request or by examining their pay stubs. Weekend overtime is open to employees who volunteer by signing the overtime signup sheet. If there are not enough volunteers, employees are supposed to be assigned based on fewest overtime hours worked.

Pursuant to the CBA, overtime lists are required to be posted on the bulletin board. In 2009, however, Site Manager Shoun Walle and Union chairperson Lamont Davis agreed that overtime and seniority lists would no longer be posted because they were frequently removed or laced with profanities. In April, Davis informed Walle that unit members were complaining that the overtime and seniority lists were not posted.<sup>10</sup>

## D. Body Wash Work Assignments

Overtime work at SHAP can include assignment to clean the Body Wash area, which contains dirty, grimy machinery and equipment. The work is performed on weekends when the

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<sup>&</sup>lt;sup>5</sup> Except as to the Body Wash area, discrepancies between Powell's testimony and the records as to when she worked where within SHAP have little bearing on the issues in this case. (RE Exh. 1; Tr. 106, 270-271, 273-274, 340-343; 532, 841-842.)

<sup>&</sup>lt;sup>6</sup> It is not disputed that the meetings were held regularly in the cage area. (RU Exh. 4, 16; Tr. 841, 847-851.)

<sup>&</sup>lt;sup>7</sup> GC Exh. 12; RU Exh. 4, 20.)

<sup>&</sup>lt;sup>8</sup> RE Exh. 5; Tr. 144, 146, 896, 992-993.

<sup>&</sup>lt;sup>9</sup> Powell conceded the availability of overtime work information in sources other than the posted list. (Tr. 146, 408-409, 993, 1084-1085.)

<sup>&</sup>lt;sup>10</sup> There was no evidence to refute Walle's testimony that he and Davis entered into this arrangement in 2009. (GC Exh. 2 at 13; Tr. 80, 91, 144, 146-147, 275-276, 992-993, 1033-1034.)

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plant operations are shut down. While weekend work also includes other tasks, such as mopping aisles and working in the final wash, the Body Wash is the bulk of the work. Accordingly, it is not an overtime opportunity that most employees, including Powell, seek. 11 During the period of January 1 through May 20, a group comprised of four males - LeVaughn Davis, Amber Abobker, Dishan Longmire and Kiernan Johns – was assigned to clean the Body Wash nearly 79% of time. 12 At times, depending on the amount of work, that group would expand to five or six workers. Moreover, the Body Wash group seldom included female employees. During the same period, at least one female employee was assigned to perform work in the Body Wash 17% of the overtime shifts. However, the list was not always accurate, as the number of females who actually worked in the Body Wash area was less. 13

# E. Powell's Discussions Regarding the Overtime List

Powell, the charging party, previously worked the Body Wash when she worked the third shift. By the time she got to the first shift in 2012, the Company knew that she did not want to work in the Body Wash and her wish was granted.<sup>14</sup> Prior to April 11, the Company overtime list reflects that Powell worked two Saturdays, on January 28 and April 7. However, Powell's actual payroll record indicates that she did not work on either of those dates.<sup>15</sup>

On April 11, Powell was working at the Fitness Center when she asked Margaret Faircloth, the steward, why the overtime and seniority lists were not posted on the bulletin board and employees were not getting charged overtime hours. Coworkers Marquita Harris and Shantell Thomas were also present during the discussion. Faircloth said she did not know and asked Powell if she wanted them posted. Powell answered indirectly that the list was supposed to be posted. Faircloth explained that the list was not posted because second and third shift

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<sup>&</sup>lt;sup>11</sup> Davis was the only exception. (Tr. 288-289, 617-618, 748, 898, 995-996).

<sup>&</sup>lt;sup>12</sup> That group performed Body Wash work on 66 of the 84 weekends between January and May. (GC Exh. 11; Tr. 211-212, 214, 226-227, 287, 364, 564, 582, 749, 764, 788-789.) While the records do not specify dates, Walle credibly explained that employees worked in the Body Wash on the weekends listed. (GC Exh. 11; Tr. 123-124.)

<sup>&</sup>lt;sup>13</sup> Neither the Company nor the Union refuted the testimony of several credible employees that they did not work in the Body Wash on weekends that their names were on the overtime lists for certain weeks. The witnesses were Jackie Keys (Tr. 121, 550), Marquita Harris (Tr. 593.) and Patrice Williams (Tr. 748-749.).

<sup>&</sup>lt;sup>14</sup> It is not disputed that Powell performed Body Wash work prior to transferring to the first shift in 2012. (Tr. 132.) In contrast to her Body Wash assignments while during her time on the third shift, the credible testimony reveals that Powell's desire to avoid Body Wash work while on the first shift was granted, as Walle did not care who performed the work. (Tr. 286-289, 589, 616-617). Circumstances changed, however, after Powell complained in April about the need to post the overtime and seniority lists. She was retrained later that month and assigned to work in the Body Wash on May 5. (Tr. 141, 201-202, 297.)

<sup>&</sup>lt;sup>15</sup> GC Exh. 11, 25.

<sup>&</sup>lt;sup>16</sup> It is perplexing as to why Powell pushed the issue of posted overtime lists. Her explanation about low overtime hours and lack of seniority as factors that would cause her to be assigned to the Body Wash was not credible since she did not work overtime in the Body Wash since coming to the first shift, as the overwhelming amount of that work was being performed by a specific group of first shift males. (Tr. 278, 287, 407, 414-417, 521, 589). Indeed, Powell conceded that she did not want to know her overtime hours because she was not "doing overtime" (Tr. 357.), which conflicts with her statement to the Board that she

employees were filing grievances alleging that a disproportionate amount of the overtime opportunities were going to first shift employees.<sup>17</sup> A few days later, Powell expressed her concern about the overtime equalization list to Sean Dean, vice president of the Local Union. He responded by directing Davis to post the list.<sup>18</sup>

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Later that morning, Harris told Powell that Faircloth informed Davis that Powell and Harris requested that overtime and seniority lists be posted in the cage area. Powell then confronted Faircloth and asked if she did inform Davis and others about her request to have the overtime lists posted. Paulsen and Thomas were present. Paulsen asked if there was a problem. Powell responded that there was no problem, except that the lists were supposed to be posted. Derrick Hamlet, the Local Union alternate chairperson joined the conversation as Powell asked again why the listing was not posted or canvassed so that employees could be charged. Hamlet interjected, said the meeting was over and that the list would be posted the following Monday. Faircloth told Powell that she passed along her request to Davis and others because it was in Powell's best interests. Powell replied that she wanted to leave the Union, which Paulsen explained was not possible. Faircloth, however, said that would be possible.

# F. April 12

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On April 12, Powell and Harris spoke to Walle about the overtime and seniority lists. Around the same time, Davis also informed Walle about complaints by Powell and others that the overtime list was not posted. Powell told Walle she was concerned about the canvassing of overtime hours and how hours were being charged. Powell reiterated her disinterest in working in the Body Wash as little as possible and urged Walle to canvass the employees to ensure that everyone had at least every other weekend off. Walle replied that he did not care who worked in the Body Wash, provided there were sufficient volunteers. He also explained that the overtime

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was working overtime every weekend. In fact, Powell was able to call out on at least three days that she was assigned to overtime work – March 16, 23 and 29 – in order to avoid overtime. (Tr. 446; GC Exh. 25.). In actuality, neither Powell nor Harris wanted the overtime equalization list posted because they would have to work the Body Wash area. (Tr. 281, 592, 617.)

<sup>17</sup> The weight of the credible evidence supports Faircloth's remarks that most overtime opportunities were going to first shift employees and that other employees were complaining. Davis, in particular, worked during most weekends. (Tr. 693, 721, 1019-1021; GC Exh. 11, 24, 28; RE Exh. 20.).

<sup>18</sup> I credit Powell's testimony that she spoke with Dean and that he directed Davis to post the list. (Tr. 74-75, 77-78, 85, 276-279.) Harris credibly corroborated Powell's testimony about the conversation. (Tr. 278-281, 283-284, 287, 418, 446, 481, 586-589, 646.) I am perplexed, however, as to why Powell continued to pursue the issue since she, as well as Harris, did not want to work the Body Wash. (Tr. 281, 592, 617.) Powell's explanation about low overtime hours and lack of seniority as factors that would cause her to be assigned to the Body Wash was not credible, since she had not worked in the Body Wash since coming to the first shift; the overwhelming amount of that work was being performed by a specific group of first shift male employees. (Tr. 278, 287, 407, 414-417, 521, 589). Moreover, Powell conceded that she did not want to know her overtime hours because she was not "doing overtime" (Tr. 357.), which conflicts with her statement to the Board that she was working overtime every weekend. In fact, Powell avoided overtime by calling out on at least three assigned overtime dates – March 16, 23 and 29. (Tr. 446; GC Exh. 25.)

<sup>19</sup> Faircloth did not refute this credible testimony. (Tr. 282-286, 439, 481-483, 591-593.)

list had not been posted because employees on second and third shift were complaining about not getting enough overtime.<sup>20</sup>

# G. April 16

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Not satisfied with Walle's response, Powell requested a meeting with Local Union vice president Shawn Dean. On April 16, Powell met with Dean and Davis in the Local Union office. Powell recounted her May 11 conversation with Faircloth, expressed her displeasure with the Union's representation and wanted to leave the bargaining unit. After Dean said he would provide the applicable information, Powell laced into Davis. She chided him for reporting her comment to management instead of speaking with her. Davis responded that he did not have to speak with her. After a further exchange of personal attacks, Dean attempted to calm the situation by sending Davis get Powell's file.<sup>21</sup> Before long, however, Richie called Powell on the phone and instructed her to return to her job, even though she received permission to attend the meeting.<sup>22</sup>

# H. Powell's Work Assignment Changes

After speaking to Faircloth on April 11, Powell worked overtime the next five weekends

(April 14 through May 12).<sup>23</sup> In addition, on April 20, Richie informed Powell of a change in her work assignment by requiring that she perform her normal duties in four hours, and that the remainder of her shift would be dedicated to sweeping floors in the main plant. On April 29, Powell was "trained" in the Body Wash. On May 5, she was assigned to work in the Body Wash for the first time as a first shift employee.<sup>24</sup>

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# I. Powell's May 10 Discipline

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On May 10, Powell attended the morning pre-shift meeting in the cage area.<sup>25</sup> Others present included Walle, Paulsen, Faircloth, Belinda Tanner, Williams, Harris, Hamlet, Johns, Bullard and Moore. During the meeting, Walle observed Powell walk from the area where the meeting was being conducted to look at the bulletin board near the cage area entrance – a

<sup>&</sup>lt;sup>20</sup> I found Powell's testimony that she confronted Walle more credible than his denial that she spoke with him on April 12. The credible evidence reveals that Powell and Davis had significant problems communicating and that Powell would have gone over his head to Walle. (Tr. 111-112, 146-147, 200, 215, 286-289, 408-415, 447, 521, 616-617.)

<sup>&</sup>lt;sup>21</sup> Davis did not credibly refute Powell's assertions that he had a personal problem with her. (Tr. 66, 74-75, 80, 77-80, 93-96, 99, 292-295, 387, 408-415, 505-506, 974-977; RU Exh. 2.)

<sup>&</sup>lt;sup>22</sup> Richie did not dispute Powell's account. (Tr. 296.)

<sup>&</sup>lt;sup>23</sup> The credible evidence indicates that the overtime work did not include assignment to the Body Wash. (GC Exh. 25.)

<sup>&</sup>lt;sup>24</sup> This was the first time Powell worked in the Body Wash area as a first shift employee. (Tr. 201-202, 296-297, 342, 522-524.; GC Exh. 11).

<sup>&</sup>lt;sup>25</sup> I do not credit testimony by Davis about prior remarks to him by Richie about Powell's conduct at pre-shift meetings since no one from the Company brought this to Powell's attention prior to May 10. (Tr. 902, 913, 916-918, 1047.) However, I do credit Faircloth's unrefuted testimony that, at her supervisor's request, she spoke with Powell about her conduct wearing headphones and singing while others were talking. (Tr. 1047-1048.)

distance of approximately forty to fifty feet away.<sup>26</sup> It was not uncommon for employees to move around or engage in other conduct during the pre-shift meetings, eating, using the microwave, going to their lockers or even stand outside the cage area during the meetings.<sup>27</sup>

After the meeting, Richie approached Powell and quizzed her about the main safety topic of the meeting. <sup>28</sup> Walle and Paulsen were also present. Powell responded incorrectly that the presentation dealt with trash pickup, when in fact the main safety topic discussed dealt with cautionary advice to be observant of hi-lo vehicles in their work areas. <sup>29</sup>

Later that day, Powell was issued a written discipline for moving around and not paying attention during the morning meeting.<sup>30</sup> Wanting to avoid communicating with Davis, Powell contacted Dean and Union Local President Bill Parker. Parker assured Powell that someone would get back to her. Davis and Faircloth contacted her the following day and believed that "everything was smoothed out." Powell, however, never asked them to file a grievance concerning the May 10 discipline.<sup>31</sup>

# J. Powell's Relationship with Faircloth and Tanner

Sometime in early May, Powell was speaking in the parking lot with Balinda Tanner,
Patrice Williams and Jackie Keys. During that conversation, Powell stated that she wanted to
fight Faircloth and offered to pay \$100 to anyone else who would fight her. Tanner passed along
the comment to Faircloth the next day. Powell, learning that her comments reached Faircloth,
apologized to the latter.<sup>32</sup>

Subsequently, on May 10, Powell engaged in a fight at work with Dishan Longmire, her ex-boyfriend, because she saw him embrace Tanner. There is no doubt that this touched off bad feelings between Powell and Tanner.<sup>33</sup>

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<sup>&</sup>lt;sup>26</sup> Consistent with the weight of the credible evidence that Powell did not want to work overtime, I do not credit her testimony that she went to the bulletin board to sign up for overtime. (Tr. 151-153, 254-257, 298-302, 738.)

<sup>&</sup>lt;sup>27</sup> It is not disputed that employee conduct at pre-shift meetings was a problem that concerned the Company. (Tr. 302-304, 738-740, 790-791.901, 918, 998-999.) Tr.

<sup>&</sup>lt;sup>28</sup> Richie credibly testified that he was not involved in the discipline issued, but was present when Powell was questioned about the pre-shift subjects, and he agreed with the discipline. (Tr. 244-245, 254-257.)

<sup>257.)</sup>Powell did not provide credible evidence that she was paying attention to the presentation. (Tr. 151-152, 300).

<sup>&</sup>lt;sup>30</sup> GC Exh. 6.

There was scant detail about the May 11 discussion between Powell, Faircloth and Davis. (Tr. 304-307, 317-320, 355, 423-424, 449, 484-485, 529, 919, 1049-1050.)
 This credible testimony by Tanner and Faircloth was not refuted by Powell. (Tr. 923-924, 1060,

<sup>&</sup>lt;sup>32</sup> This credible testimony by Tanner and Faircloth was not refuted by Powell. (Tr. 923-924, 1060 1129-1131.)

<sup>&</sup>lt;sup>33</sup> Powell provided inconsistent and less than credible testimony as her reasons for fighting with Longmire. (Tr. 434, 452-455.) The credible evidence of coworkers indicates that she engaged in the fight because of Tanner. (Tr. 643-645, 669, 812.)

# K. Powell's Suspension

On May 11, as the janitors mulled around the cage area before starting the first shift, Powell was engaging in a conversation with another employee about their supervisor when Tanner made a comment. Powell uttered to Tanner: "I see I'mma have to tear off into your motherfucking ass." Tanner then responded, "[y]eah, yeah, whatever, whatever; that ain't going to happen.<sup>34</sup> Faircloth was not present in the room at the time.<sup>35</sup>

Immediately following the incident, Tanner reported the comments to Faircloth and Davis, and the three went to Walle to register a complaint against Powell. Faircloth and Tanner each submitted statements. With Davis present, Walle proceeded to interview several employees present during the encounter, including Keys, Moore and Bullard. Keys and Hudson had no knowledge of anything unusual that happened in the cage area. Moore and Bullard both reported that they did not hear or see any altercation. Hudson told Walle that there was no altercation or threat made by Powell.<sup>36</sup> Meanwhile, Patrice Williams, Longmire, Thomas and "Deborah" were never interviewed by the Company.<sup>37</sup> Davis, who was present for all of these interviews, never asked any questions at any time, and never took any notes.<sup>38</sup>

Later that morning, Powell spoke with Davis and Faircloth. Davis told Powell that Dean asked him to speak to her about her problems. Powell told Davis she didn't understand how everything got blown out of proportion about the posting (overtime and seniority). Davis explained that he did not request that the overtime and seniority lists be posted so that female employees would not have to work in the Body Wash. Powell suggesting they have union meetings and Davis said he was working on that and the meeting concluded.<sup>39</sup>

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On May 12, shortly after Powell reported to work, Faircloth told her to report to Walle's office. 40 When Powell arrived, Davis took her outside and asked if she recently had an altercation with another employee. Powell asked if it was Tanner because she saw them speaking outside that morning. Davis confirmed that he was referring to Tanner. After Powell downplayed any recent communication with Tanner, Davis said he would try to help her. Davis took Powell to the

<sup>&</sup>lt;sup>34</sup> The General Counsel sought to impeach Tanner's credibility based on a previous guilty plea to an assault. (Tr. 1167-1174.) I foreclosed additional inquiry into the circumstances regardless this prior bad act, as they were collateral to the matter at hand and had little relevance in assessing truthfulness. In any event, I found Tanner's testimony more credible than the tentative and inconsistent testimony of Powell. (Tr. 315-317, 473-476, 480, 743-744, 1135-1140; RE Exh.4, 7, 20).

<sup>&</sup>lt;sup>35</sup> I find, based on the credible testimony of Hudson that Faircloth was not present at the time. (Tr. 784-785, 1061-1062). As an aside, it should be noted that I precluded testimony by Tanner as to whether Faircloth ever directed a racial slur towards her as a collateral issue. (Tr. 1154-1160.)

<sup>&</sup>lt;sup>36</sup> I credit the testimony of these witnesses. (Tr. 112-118, 117, 173-174, 184-186, 217-218, 545, 547-548, 560, 583, 781-784, 787, 804-805, 927, 939-940; GC Exh. 5.)

<sup>&</sup>lt;sup>37</sup> Williams is the only one who testified (Tr. 745.), but there is no documentary evidence that the others were interviewed.

<sup>&</sup>lt;sup>38</sup> It is evident that Davis' role as Union representative on behalf of Powell was entirely passive. (Tr. 202-203, 1003-1015)

<sup>&</sup>lt;sup>39</sup> Powell testified that she thought, based on the conversations in the meeting, that her problems relating to the Tanner incident were resolved. (Tr. 317-320.)

Walle confirmed Powell's testimony that she gave her statement on May 12. (Tr. 155-156, 160; RE Exh. 7.) As such, I do not credit Davis' testimony that he took Powell's statement on May 11.

Union trailer where she started to write her statement. Davis told her that she has to watch what she says because everything she says gets back to him, and nothing gets past him.<sup>41</sup>

Davis drove Powell back to Walle's office. When they arrived, Walle and Faircloth were waiting. Powell submitted her statement of the May 11 incident with Tanner, at which point Walle told her that she was suspended pending an investigation of the alleged threat. <sup>42</sup> Powell, however, refused to sign the suspension. Neither Faircloth nor Davis spoke up on her behalf during this meeting. <sup>43</sup>

## L. Powell's Discharge and Grievance

Powell was terminated on May 16 for threatening Tanner on May 11.<sup>44</sup> In arriving at that decision, Walle considered Powell's bad attitude and personal demeanor, although there was no reference to those characteristics in her personnel file. Given the quantum of witness statements either favoring Powell's position that nothing significant happened on May, 11, it is clear that Walle's problem with her attitude was the driving force behind his decision to terminate her.<sup>45</sup>

On May 18, Faircloth filed a timely grievance challenging Powell's discharge. Faircloth represented Powell at the Step 1 meeting, but offered no arguments on her behalf. The grievance was denied at Step 1.<sup>46</sup>

The Local Union proceeded to Step 2. After Davis met with Walle, the Company agreed to settle the grievance by reinstating Powell, with no backpay, on the condition that she complete an anger management class and submit to a 90-day last chance agreement.<sup>47</sup> The proposed settlement was consistent with the recent settlement of Kendall Shepard's grievance after he was terminated for threatening Faircloth in June 2011. Shepard accepted the settlement, completed its conditions and was reinstated.<sup>48</sup>

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<sup>&</sup>lt;sup>41</sup> I base this finding on Powell's credible testimony. (Tr. 320-324.)

<sup>&</sup>lt;sup>42</sup> Company Human Resources director Ruth Ann Little testified that she consulted Walle during the investigation and she had no knowledge of any other misconduct Powell committed at the time she made her decision/recommendation, and there were no other incidents of similar misconduct in Powell's file. (Tr. 51-52, 56.)

<sup>&</sup>lt;sup>43</sup> Neither Davis nor Faircloth disputed Powell's testimony that they were silent during the May 12 meeting with Walle. (GC Exh. 8; Tr. 155-156, 188, 191-192, 325-328, 393, 398, 949-951).

<sup>44</sup> GC Exh 9

<sup>&</sup>lt;sup>45</sup> It is clear that Walle had a significant problem with Powell's attitude and that was the driving force behind his decision to terminate. However, I found no credible evidence to suggest that Davis, Faircloth, Tanner or anyone else from the Local Union exerted undue influence into that decision. (Tr. 111, 119-120, 163, 868; GC Exh. 8-9; RU Exh. 10-11.)

<sup>&</sup>lt;sup>46</sup> It is undisputed that Faircloth remained silent throughout the first step meeting. (GC Exh. 10; Tr. 111, 113, 194, 957, 1077-1078, 1125.)

<sup>&</sup>lt;sup>47</sup> GC Exh. 10; Tr. 166-167, 956-957, 961, 1025.

<sup>&</sup>lt;sup>48</sup> RE Exh. 14A-C.

On or about May 23, Davis contacted Powell and relayed the settlement proposal to her, plus the condition that Powell <sup>49</sup> drop the NLRB charges<sup>50</sup> against management. Davis also informed Powell she would have to take an anger management course at her own expense. Powell said she was unemployed and could not afford to pay for such a course. Davis replied that the Company did not comment on that. Powell rejected the offer. Davis then settled the grievance at the second step, making no counterproposal.<sup>51</sup>

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On or about May 25, Powell called Faircloth and asked her if a grievance was filed on her discharge because she never saw one. Faircloth replied there was. Powell then told Faircloth she wanted to advance her grievance to arbitration. Faircloth informed her that is not how it works, and told her the grievance had to take its course. Powell then received a call from Davis. Powell asked Davis what type of investigation he did, and how it was determined that she was guilty and then terminated. Davis responded that "none of your co-workers had your back. None of them came to your rescue." Davis also told Powell since she turned down the offer there was nothing else that he could do.<sup>52</sup>

After Powell filed charges with the Board, Wille conducted additional interviews of employees about the May 11 incident. On June 20, he interviewed Keyes, with Davis present.<sup>53</sup> He asked Keys why she told Board representatives that management never interviewed her during the initial investigation. Keys denied making such a statement and the interview concluded.<sup>54</sup>

#### LEGAL ANALYSIS

#### I. ALLEGATIONS AGAINST THE COMPANY

The General Counsel contends that the Company violated Section 8(a)(3) and (1) of the Act by discharging Powell because she engaged in protected concerted activity, and (2) violated Section 8(a)(1) by Walle's coercive interrogation of employees regarding their communications with the Board.

## A. The Section 8(a)(3) Charge

Charges alleging Section 8(a)(3) violations are analyzed under the Wright Line

<sup>&</sup>lt;sup>49</sup> Davis testified that he spoke with a Chrysler official about providing Powell with access to a free anger management course. (Tr. 958-960.). He did not, however, refute Powell's testimony that he never told her that such a resource was available. (Tr. 379.)

<sup>&</sup>lt;sup>50</sup> The Company was served a copy of the unfair labor practice charge by regular mail on May 17, approximately 6 days before this conversation. (GC Exh. 1(a)-(b).)

<sup>&</sup>lt;sup>51</sup> Powell's testimony made it clear that she would still not have accepted the last chance agreement even if the anger management class was free. (Tr. 125, 167, 329-330, 379-380, 501, 961, 1023-1026.)

<sup>&</sup>lt;sup>52</sup> This finding is based on Powell's unrefuted testimony. (Tr. 331-333.)

<sup>&</sup>lt;sup>53</sup> Davis' testimony that it was Keys who contacted Walle about the Board statement was not credible in light of Walle's testimony that he called her back to re-interview her. (Tr. 967-969; GC Exh. 4.)

<sup>&</sup>lt;sup>54</sup> The General Counsel correctly notes that the record indicates that Walle never informed Keys that any response voluntary and not subject to reprisals. (Tr. 32-36, 118, 130-131, 548-549, 580; GC Exh. 3-5.)

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framework, which requires the General Counsel to make a prima facie showing sufficient proof to support the inference that protected conduct was a motivating factor in the employer's decision. 251 NLRB 1083, 1089 (1980). To meet this burden, the General Counsel must establish that the employee engaged in protected activity, the employer had knowledge of the protected activity, and that the employer took adverse action against the employee as a result of this protected activity. *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). Once the General Counsel has proven these elements, the burden shifts to the employer to demonstrate that he would have taken the same action even in the absence of protected conduct. *Manno Electric*, 321 NLRB 278, 281 (1996). If the evidence establishes that the reasons given for the discharge are pretextual, either in that they are false or not relied on, the employer has failed to show that it would have taken the same action absent the protected conduct, and there is no need to perform the second part of the *Wright Line* analysis. *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

Walle's investigation of the incident on May 11 between Powell and Tanner was clearly flawed. Tanner and Faircloth submitted written statements accusing Powell of conveying a threat on May 11. However, Walle interviewed other employees about the incident, including Keys, Moore, Bullard, and Hudson, but none of them corroborated Tanner's story. Keys and Hudson stated that they had no knowledge of anything unusual that happened in the cage area, while Moore and Bullard reported that they did not hear or see any altercation. Although the quantity of testimony does not necessarily mean that Walle would have been expected to have arrived at a different decision, there was no credible explanation by Walle as to whether he even considered the testimony of employees other than Tanner and Faircloth.

Nonetheless, I find that Walle *already* had a problem with Powell's general attitude—even though her attitude had not been reflected in her personnel file—which was the driving force behind his decision to terminate her. Such circumstances are normally seen as pretextual and indicative of unlawful motivation under *Golden State Foods Crop*. However, there is no indication here that Walle's problems with Powell were at all connected in any way to her protected concerted activities, such as the issue concerning her demands that the overtime list be posted on the bulletin board. It is also clear that Walle did not care whether Powell worked in the Body Wash area. Powell was assigned to the Body Wash area on May 5 as a direct result of her advocacy for the posting of the list. However, such a response could hardly be deemed an adverse action, as it was a direct result of the Company action that she advocated – the posting of an overtime list and assignment to overtime work, including the Body Wash. Without a causal connection between the alleged coercive or restraining activity and exercise of protected concerted activities under Section 7, the General Counsel has not established that the Company violated Section 8(a)(3) by firing Powell due to an *unlawfully* discriminatory purpose. That charge is dismissed.

## B. The Section 8(a)(1) Charge

An employer violates Section 8(a)(1) when it engages in the coercive interrogation of employees regarding their communications with the Board. In *Johnnie's Poultry*, 146 NLRB 770, the Board articulated a policy for permitting employers to interview employees in preparation for a Board trial: (1) communicate to the employee about the purpose of the interview; (2) assure the employee that no reprisals would occur; (3) obtain the employee's participation on a voluntary basis; (4) conduct the interview in an environment free of employer

hostility; and (5) not be coercive in nature.

On June 20, after Powell filed charges, Keys was summoned to meet with Wille. With Davis present, Will interrogated Keys for a second time about the May 11 incident. He asked her why she told Board representatives that management never interviewed her during the initial investigation. Keys denied making such a statement and the interview concluded. At the time, a Board trial was not yet scheduled in connection with Powell's charges.

Accordingly, as noted by the Company, the conversation must be analyzed under the Board's totality of circumstances approach for interrogating employees in *Rossmore House*, 269 NLRB 1176 (1984). See also *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). Applicable factors include whether the employee is an open union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, and time, place and method of interrogation.

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In this case, the background reveals no history of Company hostility towards the Local Union; indeed, Wille and Davis worked extremely well together. The meeting was conducted in Wille's office with Davis, the Union representative present. The meeting was formal, but brief. The information sought by Wille, Keys direct supervisor, related to whether Keys provided the Board with the incorrect information that Wille did not interview her during the disciplinary investigation when he actually did; the question was obviously based on public information in the charges and did not involve anything confidential in nature. Under the totality of the circumstances, I do not find the interrogation unlawfully coercive and dismiss that charge.

## 25 II. ALLEGATIONS AGAINST THE UNION

The complaint alleges that: (1) the Union violated Section 8(b)(1)(A) of the Act by refusing to process Powell's discharge grievance to arbitration because she requested the posting of seniority and overtime lists pursuant to the collective bargaining agreement for reasons that were "arbitrary, discriminatory and in bad faith;" and (2) violated Section 8(b)(2) of the Act by presenting witness statements against Powell because the latter requested the Company to post overtime and seniority lists as required by the collective bargaining agreement, and Section 8(a)(3) by causing the Company to discharge Powell.

## A. The Section 8(b)(1)(A) Charge

It is well established that "the Union has a duty of fair representation on behalf of all those for whom it acts without hostile discrimination. A union's power must be exercised fairly, impartially, and in good faith which gives an employee the right to be free from unfair or irrelevant or invidious treatment by his exclusive bargaining agent." *Bottle Blowers Local 106*, 240 NLRB 324, 328 (1979). "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). But "[w]here ... a union undertakes to process a grievance but decides to abandon the grievance short of arbitration, the finding of a violation turns not on the merit of the grievance but rather on whether the union's disposition of the grievance was perfunctory or motivated by ill will or other invidious considerations." *Bottle Blowers Local 106*, at 328. "Though ... a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree

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that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement." *Vaca v. Sipes*, supra at 191.

It is undisputed that there were bad relations between Powell and the three Local Union officials involved – Davis, Faircloth and Tanner – and they preferred to communicate with Powell as little as possible. It is also evident that Davis was directly affected by Powell's insistence that the overtime list be posted, since he stood to work less overtime in the Body Wash if the assignments were more evenly distributed among the employees. Nevertheless, it is undisputed that the Local Union filed a grievance discharge on Powell's behalf. After proceeding to Step 2, Davis was able to negotiate a settlement reinstating Powell if she signed a last chance agreement and agree to complete an anger management course. The settlement was consistent with the recent settlement of another employee's grievance involving similar facts. The General Counsel argues, however, that neither Davis nor Faircloth sought to take the grievance to arbitration after Powell declined a settlement at Step 2.

There is an absence of discernible, credible evidence that the Local Union proceeded arbitrarily or in bad faith at Step 1 or 2. The duty of fair representation does not grant individuals the absolute right – especially in a case where the Union negotiated a settlement – to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement. *Vaca v. Sipes*, 386 U.S. at 191-192.

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Under the circumstances, I conclude that the Local Union did not breach its duty of fair representation in Powell's case. There were definitely bad relations between Davis, Faircloth, Tanner and Powell. However, she was offered a reasonable deal and turned it down. In fact, the evidence reveals that Powell would still have declined the settlement even if the anger management course was offered at no cost to her.

The General Counsel also contends alleges that Tanner and Faircloth, acting as Local Union agents, restrained or coerced Powell in violation of Section 8(b)(1)(A) by submitting witness statements against her because she insisted that overtime list be posted.

With respect to motivation, there were definitely bad relations between Faircloth and Powell, even before the latter raised the issue of posting the overtime list. As to Tanner, there was a personal situation brewing involving Powell's ex-boyfriend; there is no evidence, however, that she knew anything about the overtime list issue.

The General Counsel has the burden to prove that Tanner and Faircloth acted as Union agents when they submitted witness statements accusing Powell of threatening Tanner. *Tyson Fresh Meats, Inc.*, 343 NLRB 1335 (2004). While Tanner and Faircloth had positions within the Local Union, at the time, they were acting in their capacities as employees involved in, or witness to, an incident and required to submit statements during the resulting investigation. The fact that they had positions with the Local Union did not require them to refrain from cooperating with a workplace investigation or take some other action. *IBEW, Local 45*, 345 NLRB 7 (2005); *Building and Construction Trades Council, Local 397*, 132 NLRB 1564 (1961).

Under the circumstances, I dismiss the Section 8(b)(1)(A) charge.

## B. The Section 8(b)(2) Charge

The General Counsel also contends that the Local Union violated Section 8(b)(2) when
Tanner and Faircloth submitted their statements in order to cause Powell's termination because she requested the posting of the overtime list.

A Section 8(b)(2) violation requires a showing that the Local Union caused or attempted to cause Powell's discharge. *Acklin Stamping Co.*, 351 NLRB 1263 (2007). In this case, even if Tanner and Faircloth were acting as union agents – they were not – there is no credible proof that they did anything, *separate and apart from submitting their required employee witness statements*, to cause the Company to terminate Powell. *North Hills Office Services, Inc.*, 346 NLRB 96 (2006). Under the circumstances, I dismiss this charge as well.

With respect to the International Union, there is no credible proof that any of its officials were involved in Powell's discipline or the Local Union's handling of the ensuing grievance. Powell called the International Union when she became frustrated with her communications with the Local Union, but the call resulted in the Local Union followed up after that. Given the legal distinction between the Local and International Unions, there is no derivative duty of fair representation on the part of the latter. *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212 (1979). Accordingly, the International Union's prima facie motion to dismiss, upon which I initially reserved decision, is granted as to all charges against it.

#### CONCLUSIONS OF LAW

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- 1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
- 2. The Local and International Unions are labor organizations within the meaning of Section 2(5) of the Act.
  - 3. The Company, Local Union and International Union have not violated the Act as alleged.

35 ORDER

The complaint is dismissed in its entirety.55

Dated, Washington, D.C. April 3, 2013

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Michael A. Rosas

Michael A. Rosas Administrative Law Judge

<sup>&</sup>lt;sup>55</sup> If no exceptions are filed as provided by Section 102.46 of the Boards Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.